

Rivero v. Allen, 04-15334

DEC 23 2005

Kleinfeld, Circuit Judge, concurring in part and dissenting in part:

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

I concur in the majority's disposition except insofar as it concludes that Rivero failed to exhaust his claim that the prison officials illegally confiscated his legal papers. I respectfully dissent on that point because I think Rivero did exhaust his claim in the prison administrative process, and preserved it in district court.

Rivero did not take the papers claim to the fourth level of administrative review, but that was not a failure to exhaust. The fourth level was available only for challenges to a "general policy or procedure." Rivero was not challenging a general policy or procedure. Nothing in his pleadings indicates that he was attacking an official prison policy condoning the seizure of an inmate's legal documents, or even that there was such a policy. He complains that his legal papers were confiscated without justification and that some key documents were damaged or destroyed in the process. Because these are individualized complaints rather than disputes over the legitimacy of general policies or procedures, the fourth level of administrative review was not available to him.